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No.

IN THE

Supreme Court of the United States

October Term, 1983

ROBERT J. ARNOLD,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR CERTIORARI

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Petitioner Robert J. Arnold seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 3, 1983.

QUESTIONS PRESENTED

1. Was the petitioner denied a fair trial by the introduction of similar act proof offered by the Government relative to other acts which the petitioner allegedly committed?

2. Was the evidence presented sufficient to convict the petitioner for violations of Title 18 U.S.C. §§656, 1014 and 2314?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals, which was unreported, appears in the Appendix hereto.

JURISDICTION

This petition for certiorari was filed within ninety (90) days of the date of the entry of the judgment in the Court of Appeals for the Second Circuit. This Court's jurisdiction is invoked under 28 USC §1154 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Fifth Amendment, United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Statutes under which Petitioner was prosecuted are 18 U.S.C. §§656, 1014 and 2314.

STATEMENT OF THE CASE

Essentially, the petitioner was convicted of securing various loans obtained from M & T Bank, Lockport,

New York, through the Bank manager, Charles Edmunds. The loans which were granted by Edmunds were authorized in the name of Bruce F. Arnold, a brother of petitioner. Prior to obtaining the Bank checks, the petitioner Robert J. Arnold signed the name of Bruce F. Arnold at the request of Edmunds who acted on behalf of the Bank.

Prior to granting the first loan on February 13, 1980, the petitioner was advised by Edmunds that he needed a third party, not himself, to borrow money or he would not be able to loan the money to petitioner. A financial statement was originally submitted on February 10, 1980, and the two filled out the statement.

On February 27, 1980, a Bank check was made payable to Bruce Arnold which was negotiated, with the knowledge of Edmunds, by Robert Arnold. The check was cashed in order to purchase a check made to the name of Garry Company, of which $3,000.00 was used to pay off a prior debt. (II-174)*

On February 27, 1980, another loan was given in the amount of $39,000.00, again in the name of Bruce Arnold. Relative to the second loan, Edmunds had stated that he requested Robert Arnold to obtain the loan in order to obtain two months of payments for other unrelated loans which were becoming difficult for Edmunds to carry on the M & T Bank records, inasmuch as they were in arrears. Edmunds told petitioner that in return for obtaining the Bruce Arnold loan he would pick up the payments of that loan. Again, petitioner signed the name of Bruce Arnold

*Numbers in parentheses refer to pages in the record.

and cashed the check which was subsequently made out to a business owned by Edmunds.

On March 25, 1980, Edmunds authorized a third loan in the amount of $75,000.00 again to Bruce Arnold. He told petitioner that he was in arrears on previous loans and Edmunds suggested that he could combine the loans and use part of the money to pay other unrelated debts. Robert Arnold signed the various documents and the check paid the first Bruce Arnold loan and a separate unrelated loan.

Proof at the trial educed the fact that Edmunds was authorized to grant any personal loan in an amount less than $75,000.00 without having to have any supporting documents or financial statements inasmuch as he had the sole exercise of discretion in granting those types of loans. The Bank essentially used no methods of review for the loan and Edmunds possessed sole decision making processes in order to grant the loan.

Finally, Edmunds indicated that it was he who had initiated the various conversations of obtaining the loans in the name of Bruce Arnold. He told petitioner that he had a problem with other unrelated loans and other situations of which petitioner did not know and he needed help from Robert J. Arnold. He stated that he could have granted the $75,000.00 based singularly on the signature of Robert or Bruce Arnold inasmuch as he needed no justification for granting those types of loans in the first instance.

REASONS FOR GRANTING THE WRIT.

I.

THE SIMILAR ACT PROOF OFFERED BY THE GOVERNMENT SHOULD NOT HAVE BEEN PERMITTED. THE PREJUDICE TO ROBERT ARNOLD FAR OUTWEIGHED ITS PROBATIVE VALUE.

At the trial the Government offered evidence in its case in chief, as well as through cross-examination of petitioner, relative to other activities by petitioner which were claimed to be similar behavior. The Government claimed that the evidence was needed to show petitioner's intent to commit the crimes with which he was charged.

In the Government's case in chief, evidence was adduced that petitioner, during prior negotiations with another bank (not the M & T Bank, the bank directly related to the acts prosecuted in this case) had stated that he would not transfer any assets without obtaining the Bank's written permission and in that regard various property was allegedly used as collateral for a loan applied for on behalf of petitioner, and that property was transferred from the name of Robert J. Arnold to his wife.

During cross-examination of petitioner, and after objection by defense counsel, the Government was permitted to ask questions of petitioner which sought to show that he had conducted numerous other bank transactions in which, according to the Government, petitioner had misstated or had failed to state various material facts during negotiations with the bank for

purposes of obtaining loans other than the loans mentioned in the indictment.

While the Government contended that it offered the proof to show petitioner's intent, the evidence was highly prejudicial and was used in a manner in which it was obvious that the Government was seeking to show petitioner's bad character rather than his intent in this particular case.

At issue here is the meaning of, and interplay between, Rules 403 and 404(b) of the Federal Rules of Evidence.

Rule 404(b) expressly states that evidence of other crimes, wrongs or acts is not admissible to prove the bad character of a person. The rule goes on to state that such evidence may be admissible for other purposes including intent or absence of mistake or accident.

Although it has been said that there is no presumption of admissibility under Rule 404(b), *United States v. Manafzadeh*, 592 F.2d 81, 86 (2d Cir. 1979), the effective construction given by many courts has been that evidence of prior bad acts has been considered admissible except in the most extreme cases; only then has the evidence been excluded on the grounds that it tends only to show bad character.

Rule 403 provides for the exclusion of evidence that is otherwise relevant when its probative value is substantially outweighed by, e.g., the danger of unfair prejudice, confusion of the issues or misleading the jury. The plain language of Rule 403 requires that evidence admissible under Rule 404(b) will be excluded from evidence if its probative value is insufficient

when viewed in conjunction with the factors such as unfair prejudice or confusing the jury.

The Courts of Appeals have ruled on an ad hoc basis in considering these rules, largely leaving interpretation to the unfettered discretion of the trial judge. See *United States v. Hearst*, 563 F.2d 1331, 1348-1349 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978). The lack of guidance in this area should be addressed by this Court.

These rules were intended to be codification of the common law. See Notes of Advisory Committee on Proposed Rules. The result, however, has been to allow evidence of prior bad acts much more readily than before the Federal Rules of Evidence were enacted. The courts admit evidence that would have been excluded before Rules 403 and 404(b) were enacted. See *United States v. Maestas*, 554 F.2d 834, 836 n.2 (8th Cir.), *cert. denied* 431 US 972 (1977).

The common law recognized that fundamental fairness requires that a defendant be tried for the acts specified in the indictment. Permitting unrestrained questioning of a defendant as to prior bad acts subverts the essential function of a criminal trial. "The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of Court" (Wigmore, *Evidence* [3d ed. 1940], §57 at p. 456).

Although the wording of Rules 403 and 404(b) does not suggest a different result than would have been reached under the common law, after enactment of the

Rules the courts have used different analyses than previously.

Whereas before enactment of the Rules evidence of other acts was restricted, now Rule 404(b) is regarded as an "inclusory" rule: evidence is deemed admissible unless the defendant can show that the evidence only tends to prove a criminal disposition. *United States v. Calhoun*, 604 F.2d 1216, 1217-1218 (9th Cir. 1979); *United States v. O'Connor*, 580 F.2d 38, 40 (2d Cir. 1978). The cases which find that the probative value of other-crimes evidence is greatly overshadowed by its propensity to prove only a criminal disposition are rare. See, e.g., *United States v. Manafzadeh, supra; United States v. Aims Back*, 588 F.2d 1283 (9th Cir. 1979); *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977).

In this case petitioner was entitled to be tried by evidence pertaining specifically to the loans and checks in question. Yet the Government was permitted to cross-examine petitioner about a series of alleged false or inaccurate statements and applications. None had been the subject of any other criminal prosecution. They were not tied to the transactions underlying this trial, but were merely a series of unproved "bad acts."

Prior to the enactment of the Federal Rules of Evidence the evidence in question would not have been permitted. The enactment of the Rules cited has resulted in an unwarranted erosion of the restriction on examination as to bad acts. The decision below would not have occurred under the common law, and it violates petitioner's right to a fair trial in which he is tried only upon evidence relating to the crimes with which he is charged.

Prior to the enactment of the Federal Rules of Evidence character impeachment by proof of misconduct was limited to cross-examination. *United States v. Bowe,* 360 F.2d 1, 15 (2d Cir.), *cert. denied* 385 U.S. 961 (1966); *United States v. Masino,* 275 F.2d 129, 133 (2d Cir. 1960). Prior to enactment of those rules specific acts of misconduct not resulting in conviction were not the proper subject of cross-examination for impeachment purposes. *United States v. Bowe, supra,* 360 F.2d at 15; *United States v. Provoo,* 215 F.2d 531, 536 (2d Cir. 1954).

The evidence on prior bad acts permitted by the courts below was only slightly probative, if at all, of the acts charged, and had a tendency to confuse and mislead the jury by focusing attention on collateral issues. Prior to the enactment of Rules 403 and 404(b), the evidence in question would properly have been excluded. *United States v. Bowe, supra,* 360 F.2d at 15; Wigmore, *supra,* §§443, 444.

In *Michelson v. United States,* 335 U.S. 469 (1948), this Court observed that a defendant's character may not be attacked on the prosecution's case-in-chief, observing that (335 U.S. at 476-477):

> The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

A charge to the jury specifying limitations on the use of this prejudicial evidence is ineffective. This

Court has long recognized that the substantial risk of undue prejudice from a jury considering evidence for an incompetent purpose outweighs the value of prejudicial evidence which is admitted for a limited purpose. See *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963); *Tipton v. Socony Mobil Oil Co., Inc.*, 375 U.S. 34 (1963).

This petition should be granted so that the Court can address the problem of undue prejudice when such evidence is presented in the case in chief and upon cross-examination of the defendant. This issue calls for analysis by this Court in the exercise of its supervisory jurisdiction over the practice in the Federal courts.

II

PETITIONER SHOULD NOT HAVE BEEN CONVICTED UNDER THE SECTIONS CHARGED.

As noted above, the petitioner was convicted of violating 18 U.S.C. §656, to wit: misapplication of bank funds. Exactly what type of conduct which is proscribed by the statute has been impossible to understand in view of the different interpretations the act has received over the past few years. Various courts have attempted to inject logic into the confusion offered by the decision in an attempt to make some categorization of the types of cases that were generally considered to be misapplications of bank funds and others which would not fall under the ambit of the Statute. See, *United States v. Krepps*, 605 F 2d. 101, (3d Cir., 1979): *United States v. Adamson*, 665 F 2d

643 (5th Cir., 1982); *United States v. Mullins*, 335 F 2d. 883 (7th Cir., 1966) *cert. denied* 394 U.S. 942, and *United States v. Docherty*, 468 F 2d. 989 (2d Cir., 1972).

The specific problem comes from the definitions which the various Courts have given to the phrase "willfully misapplies any of the moneys . . . of such bank . . ." Thus, various Courts have attempted to establish criteria for finding violations of the statute.

1. Cases in which the bank officer knew the debtor was fictitious;

2. Cases where the bank officer knew that the named debtor was financially unable to pay the loan, and

3. Cases where the bank officer assured the debtor that it would not be his obligation to repay the loan.

This Court should review the definition of misapplication of bank funds in order to establish some reasonable understanding of the statute. The decision in the instant case conflicts in principle with the decisions of numerous other Courts of Appeals as to the proper interpretation of 18 U.S.C. §656.

Indeed, the Second Circuit previously attempted to focus upon conduct which would violate the act when monies were distributed under a record which misrepresented the true state of the record with the intent that bank officials, bank examiners or the Federal Deposit Insurance Corporation would be deceived. *United States v. Docherty*, supra.

The mere fact that a bank officer granted a loan to a named debtor with the knowledge that the proceeds would be turned over in part to him and to the bank

should, in and of itself, be insufficient to establish a violation of §656. *United States v. Gallagher,* 576 F 2d., 1028 (3rd Cir., 1978).

Until this Court gives some directions to the lower Courts as to what conduct is proscribed under the statute, it is likely that Appellate Courts will continue to interpret the statute in contradictory and conflicting manners. Instruction by the Court is necessary to resolve the instant problems and to more clearly define the intent of the Congress.

CONCLUSION

For these reasons, the writ of certiorari should be granted.

Dated: February 6, 1984

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of October, one thousand nine hundred and eighty-three.

PRESENT:

HONORABLE IRVING R. KAUFMAN,

HONORABLE JON O. NEWMAN,

Circuit Judges,

HONORABLE OSCAR H. DAVIS,

U.S. Court of Appeals, Federal Circuit, sitting by designation.

UNITED STATES OF AMERICA

Plaintiff-Appellee,

-against- 83-1070

ROBERT J. ARNOLD,

Defendant-Appellant

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of records from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Arnold contends the jury could not have found him guilty of aiding and abetting the misapplication of bank funds under 18 U.S.C. §656 because the court neglected to instruct it as to the required specific intent. This argument is meritless. The charge on this element explicitly stated: "To act with intent to defraud means to act with intent to deceive or cheat, normally for the purpose of causing a financial loss to someone, or to bring about a financial gain to ones self."

2. Arnold's insistence his "mere knowledge" of the violation of a bank rules is insufficient for conviction under 18 U.S.C. §656 is also without merit. Unlike *United States v. Docherty*, 468 F. 2d 989 (2d Cir., 1972), on which he relies, Arnold was not only aware of rules, but took active steps to falsify the information he provided to the bank.

3. Appellant claims the evidence for his 18 U.S.C. §1014 conviction was insufficient on the ground that branch manager Edmunds had "absolute" authority to approve the loans, and hence Arnold could not have had any "intent to influence" the bank. This argument is unavailing for two reasons. This Court has stated that the statute's reference to "influence" was not meant "to immunize a party from criminal liability because an officer of the bank involved in the fraudulent scheme" *United States v. Niro*, 338 F. 2d 439, 441 (2d Cir., 1964). Moreover, actual reliance by the bank of any falsifications is not required. *United States v. Goberman*, 458 F. 2d 226, 229 (3d Cir. 1972).

4. Arnold argues that the proof for his conviction of transporting a fraudulently converted check in interstate commerce, 18 U.S.C. 2314, was insufficient because mere forgery is not a violation. This count was not concerned with

forgery per se, however. Here there was a fraud consisting of a conspiracy to present false information to the bank so Edmunds might circumvent his lending authority. Appellant's reliance on *United States v. Sciortino*, 601 F. 2d 680 (2d Cir. 1979), is indicative of his confusion over the elements of this offence. The reversal in that case concerned a paragraph in 18 U.S.C. §2314 dealing with transportation of forged documents, and not the paragraph at issue in this case.

5. Appellant objects to the admission of certain "similar act" evidence pursuant to Fed. R. Evid. 404(b). That proof was introduced, however, to show Arnold's intent and was highly probative of his state of mind. Furthermore, the Court carefully weighed the value of the evidence against the danger of prejudice and instructed the jury not to use the "similar acts" as direct proof of guilt. This is a matter for the trial court's discretion which was not abused. *See United States v. Margiotta*, 662 F. 2d 131, 142 (2d Cir., 1981), *cert. denied*, 103 S.Ct., 1891 (May 2, 1983).

6. Arnold also contends the court erred in not instructing the jury as to the proper burden of proof of "lack of authorization" under 18 U.S.C. §1014. "Lack of authorization" is not an element of that offense. In addition, appellant did not make a timely request for such an instruction pursuant to Rule 30 of the Federal Rules of Criminal Procedure and so may not claim error at this time. *United States v. Clemente*, 640 F.2d 1069, 1081 (2d Cir.), *cert. denied*, 454 U.S. 820 (1981). Appellant fails to cite specific testimony, but even assuming evidence of authorization to sign his brother's name exists, that fact alone would be insufficient to absolve appellant of his use of fraudulent statements. *See United States v. Madsen*, 620 F. 2d 233, 234 (10th Cir., 1980).

7. Appellant's other claims are equally without merit.

8. Accordingly, the judgment is affirmed.

S/ _____
IRVING R. KAUFMAN

S/ _____
JON O. NEWMAN

S/ _____
OSCAR H. DAVIS

Circuit Judges

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

U.S.A.
vs.
ROBERT J. ARNOLD

A certified copy of the mandate of the United States Court of Appeals for the Second Circuit dated October 13, 1983, having been filed in the office of the Clerk of this Court on November 8, 1983, it is hereby

ORDERED, ADJUDGED AND DECREED that said mandate be, and hereby is, made the judgment of this Court.

JOHN T. CURTIN,
Chief United States District Judge

Dated: November 8, 1983
Buffalo, New York

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